

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

**GOVERNMENT'S MEMORANDUM  
IN SUPPORT OF ITS MOTIONS IN LIMINE**

The government submits this memorandum in support of its motions in limine to admit chat logs, TCNiSO website posts, private messages, and co-conspirator testimony.

## I. Legal Framework

#### A. Contextual Statements are Not Hearsay

It is well established that courts may admit statements made by another person during a conversation with the defendant in order to give context to the defendant's statements.

See United States v. Colon-Diaz, 521 F.3d 29, 38 (1<sup>st</sup> Cir. 2008) (holding that statements constituted reciprocal and integrated utterances and merely served to put co-conspirator's statement into perspective and make it intelligible to the jury).

### **B. Verbal Acts are Not Hearsay**

Statements that are not assertions or that have independent legal significance, such as words by contracting parties, statements giving consent or offers, are not hearsay. United States v. Diaz, 597 F.3d 56, 64 (1<sup>st</sup> Cir. 2010). Likewise, verbal acts are not hearsay. United States v. Faulkner, 439 F.3d 1221, 1225-27 (10th Cir. 2006) (holding that statements of planning, directing, or agreement of conspiracy are verbal acts, not hearsay); United States v. Bellomo, 176 F.3d 580, 586-87 (2d Cir. 1999) (holding that

statements offered as commands, threats or rules directed toward a witness are not hearsay, so no foundation for co-conspirator statements need be established).

### C. Co-Conspirator Statements are Not Hearsay

Fed. R. Evid. 801(d)(2)(E) provides: "A statement is not hearsay if . . . it is offered against an opposing party and was (E) a statement by the party's coconspirator during and in furtherance of the conspiracy." Admission of a co-conspirator statement requires that four elements be satisfied by a preponderance of the evidence: 1) a conspiracy must have existed; 2) the defendant must have been a member of it; 3) the declarant must also have been a member; and 4) the declarant's statement must have been in furtherance of the conspiracy. United States v. Colón-Díaz, 521 F.3d 29, 35-36 (1<sup>st</sup> Cir. 2008); United States v. Marino, 277 F.3d 11, 25 (1<sup>st</sup> Cir. 2002). Such statements are admissible even when no conspiracy is charged. United States v. McDowell, 918 F.2d 1004, 1009 (1<sup>st</sup> Cir. 1990). The statement need only further any conspiracy, not necessarily the one charged. United States v. Maliszewski, 161 F.3d 992, 1008 (6th Cir. 1998).

A defendant need not be aware of the details of the statement for it to be admissible against him. Marino, 277 F.3d at 25. The proponent of the evidence must show the conspiracy by evidence including "some extrinsic proof," United States v. Sepulveda, 15 F.3d 1161, 1182 (1st Cir. 1993), and cannot rely exclusively on the statement itself.

Courts have held that a statement is in furtherance of a conspiracy if it "tends to advance the objects of the conspiracy as opposed to thwarting its purpose." United States v. Rodriguez, 525 F.3d 85, 101 (1st Cir. 2008). "The reporting of significant events by one coconspirator to another advances the conspiracy." Sepulveda, 15 F.3d at 1180. Likewise, statements made to keep other coconspirators "abreast of the conspiracy's

activities [are] in furtherance of the conspiracy.” United States v. Aviles-Colón, 536 F.3d 1, 7 (1<sup>st</sup> Cir. 2008) (citing Sepulveda, 15 F.3d at 1180). Statements made to encourage further sales, for example, by “puffing” the products, are “in furtherance of” a conspiracy, as are statements made to reassure, gain the trust of others, or induce their enlistment or encourage their continued participation. Colon-Diaz, 521 F.3d at 37.

As a procedural matter, in order to conserve judicial resources, the Court can conditionally admit the statements and make its determination about the existence of the conspiracy at the close of all of the evidence, on the record and outside of the jury’s presence. United States v. Ciampaglia, 628 F.2d 632, 638 (1<sup>st</sup> Cir. 1980), United States v. Petrozziello, 548 F.2d 20 (1<sup>st</sup> Cir. 1977). Notably, whether each user was a part of a separate conspiracy with Harris or each was part of a single hub-and-spokes conspiracy is of no moment in determining the statements’ admissibility.

#### **D. No Need For Co-Conspirator’s Actual Name**

As set forth below, the government seeks to introduce online communications between Harris and co-conspirators. With all but Phillips, Harris had an online, rather than in-person, relationship with them. With today’s technology, it is common for cybercrime conspiracies to be conducted entirely over the internet, often with overseas co-conspirators, who know each other only by online nicknames. Money can be exchanged online through Paypal and other accounts, and instructions and equipment can be delivered online, all without the conspirators’ knowing each other’s true names. Indeed, Lindquist will testify that she communicated with Harris almost daily and exclusively online for almost a year before he revealed his true name to her. Specifically, as described in more detail below, “Mr. T” acted as a broker for Harris, receiving

commissions for referring him customers, and Harris knew his online nickname, his e-mail account, and his paypal account (into which Harris deposited money). But it is not clear that Harris ever learned Mr. T's actual name (nor has the government). "MooreR" wrote some of the key software components for Harris, and Harris knew his online nickname and the website addresses where MooreR provided him with samples of his software code. Likewise, it is not clear that Harris ever learned MooreR's actual name (nor has the government).

Notably, however, whether Harris knew the actual names of his co-conspirators is not dispositive on the question of whether declarations by these individuals are co-conspirator statements. It is well settled that, in order to be convicted of conspiracy, the government need not prove that the defendant "knew every other co-conspirator." First Cir. Pattern Jury Instr. (Criminal) 4.03 (1998). In that vein, the First Circuit has held that a defendant need not directly communicate with his co-conspirators. See United States v. Mena-Robles, 4 F.3d 1026, 1033 (1<sup>st</sup> Cir. 1993) (affirming conspiracy conviction, holding that "the jury need not be presented with evidence showing that each coconspirator knew . . . every other coconspirator"). Thus, these individuals can be co-conspirators, and if their statements are in furtherance of the conspiracy, they are admissible as co-conspirator statements.

## **II. OVERVIEW OF CHATS DISCUSSED IN MEMORANDUM**

The government intends to offer approximately 25 excerpts of "chat logs," or transcripts of online chats between Harris and another declarant. Because Harris's part of the chats constitutes party admissions, we do not address excerpts that contain only his statements (along with a merely incidental response by the declarant). Rather, in this

memo, we address only the chat excerpts containing substantive statements by other declarants.

Each declarant's chat excerpts are marked as their own trial exhibit (for example, the chats between Harris and Craig Phillips are marked as Exhibit 5, the chats between Harris and Isabella Lindquist are Exhibit 6, etc.). For each chat excerpt that we intend to introduce, we have included the entire page in order to provide context. (As a practical matter, however, there is often no context because many of the statements in the chats are non-sequitors. The chats often ramble through many different topic areas seemingly all at once). At trial, we intend to show the jury only the excerpted portions discussed below. If the court would like, we can redact the exhibits so they include only the portion we intend to highlight for the jury. Some exhibits consist of only one page, where there is only one excerpt that we intend to offer. Other exhibits are multiples pages, each page containing one or two excerpts to be highlighted.

### **III. PHILLIPS'S STATEMENTS IN CHATS WITH HARRIS**

#### **A. Phillips was Harris's Co-Conspirator**

The government will prove that Craig Phillips was a co-conspirator based primarily on his own testimony at trial. He has already pled guilty to computer-related fraud for his involvement in TCNiSO. The government expects that he will testify that he was an officer of TCNiSO from approximately 2003 to 2007, that he helped Harris run the company, that he knew that the purpose of TCNiSO's products and services was to help users steal cable internet service, and that he intended to contribute to this effort. Phillips will testify that, in his chats with Harris (Exhibit 5), he used the nickname "YoUrMoMmA" and Harris used "DerEngel."

### B. Ex. 5, p.1 [Phillips using stolen MAC address]

In this excerpt, Phillips tells Harris that he is using a “stolen MAC” to get internet service and is getting extremely high-speed service.

1/3/2005 4:54:03 PM (d)[IN] YoUrMoMmA (d) DerEngel	iam gettign fucken 232k up right now
1/3/2005 4:54:11 PM (d)[IN] YoUrMoMmA (d) DerEngel	seriously thats fucken fast
1/3/2005 4:54:21 PM (d)[IN] YoUrMoMmA (d) DerEngel	i ahve someoneelse on the ftp
1/3/2005 4:54:23 PM DerEngel (d)[IN] YoUrMoMmA (d)	very impressive
1/3/2005 4:54:35 PM (d)[IN] YoUrMoMmA(d) sends myupload.bmp	
1/3/2005 4:54:35 PM DerEngel (d) [IN] YoUrMoMmA (d)	definately faster than my 900 k up
1/3/2005 4:55:31 PM You have successfully received C:\Documents and Settings\DerEngel\My Documents\My Received Files\myupload.bmp from (d)[IN]YoUrMoMmA(d).	
1/3/2005 4:56:05 PM (d)[IN] YoUrMoMmA (d) DerEngel	you only get about 100k up on average huh
1/3/2005 4:56:09 PM (d)[IN] YoUrMoMmA (d) DerEngel	i mean 100kb
1/3/2005 4:56:47 PM (d)[IN] YoUrMoMmA (d) DerEngel	thats why i love rr
1/3/2005 4:56:51 PM (d)[IN] <b>YoUrMoMmA</b> (d) DerEngel	<b>iam usign a stolen mac</b> and seriell for this ftp
1/3/2005 4:56:54 PM (d)[IN] YoUrMoMmA (d) DerEngel	110K it seems right now
1/3/2005 4:57:06 PM DerEngel (d)[IN] YoUrMoMmA (d)	and i have my regular hosue modme runnign completely for my mom and My other computer
1/3/2005 4:57:21 PM (d)[IN] YoUrMoMmA (d) DerEngel	

By reporting to Harris that he has modified his modem’s MAC address (which, he will testify, TCNiSO’s products were designed to allow users to do) and that this modification had helped him obtain faster internet service (which, he will testify, was another intended use the products), Phillips was reporting to Harris on the success of TCNiSO’s products. This statement was, therefore, in furtherance of the conspiracy. See United States v. Aviles-Colón, 536 F.3d 1, 7 (1<sup>st</sup> Cir. 2008) (statements made to keep other coconspirators “abreast of the conspiracy’s activities [are] in furtherance of the conspiracy”). Furthermore, even if the Court were not to admit this statement for the truth of the matter asserted, it is relevant to show Harris’s knowledge that his partner in TCNiSO was talking about using a stolen MAC address. To the extent that part of Harris’s defense appears to be that he did not know what users were doing with his products, the fact that his co-conspirator is at least saying that he has gotten internet access using a stolen MAC address is quite relevant to rebut this defense.

**C. Ex. 5, p.5 [Phillips using uncapped modem for higher speed service]**

In this excerpt, Phillips tells Harris that he is switching to an uncapped modem to get faster speed internet service.

1/11/2005 11:18:48 PM (d)	<b>YoUrMoMmA(d)</b>	DerEngel	<b>iam not on uncapped modem</b>
1/11/2005 11:18:52 PM (d)	YoUrMoMmA(d)	DerEngel	give me 30 seconds
1/11/2005 11:18:54 PM	DerEngel (d)	YoUrMoMmA(d)	ok
1/11/2005 11:19:02 PM (d)	YoUrMoMmA(d)	DerEngel	<b>i will chnage modems ok</b>
1/11/2005 11:20:44 PM (d)	YoUrMoMmA(d)	DerEngel	ok youi ready now
1/11/2005 11:21:03 PM (d)	YoUrMoMmA(d)	sends Scooter.-.Mind.The.Gap-2004.rar	
1/11/2005 11:21:15 PM (d)	YoUrMoMmA(d)	DerEngel	speed for you
1/11/2005 11:21:34 PM (d)	<b>YoUrMoMmA(d)</b>	DerEngel	accept <b>iam uncapped</b>
1/11/2005 11:23:13 PM (d)	YoUrMoMmA(d)	sends Scooter.-.Mind.The.Gap-2004.rar	
1/11/2005 11:23:16 PM (d)	YoUrMoMmA(d)	DerEngel	there
1/11/2005 11:24:49 PM	DerEngel (d)	YoUrMoMmA(d)	ok
1/11/2005 11:25:00 PM (d)	<b>YoUrMoMmA(d)</b>	DerEngel	<b>much nicer speeds</b>

Once again, Phillips is reporting on his successful use of TCNiSO's products, which makes this a co-conspirator statement. Furthermore, the excerpt is admissible as evidence of Harris's knowledge that Phillips is talking about using an uncapped modem to obtain higher speed service.

**D. Ex. 5, p. 6 [Harris requesting information about Phillips's uncapped modem]**

In the first part of this chat excerpt, Harris asks for the name and speed of the configuration file that Phillips is using on his uncapped modem. Phillips's responses need not be admitted for their truth but only to give context to the defendant's questions and to make the conversation understandable for the jury. See Colon-Diaz, 521 F.3d at 38.

1/24/2005 8:09:44 PM	<b>DerEngel</b> (d)	YoUrMoMmA(d)	<b>whats the name of the cfg file</b>
1/24/2005 8:09:50 PM	<b>DerEngel</b> (d)	YoUrMoMmA(d)	<b>that you are using for your uncapped modem?</b>
1/24/2005 8:10:07 PM (d)	YoUrMoMmA(d)	DerEngel	why
1/24/2005 8:10:13 PM	DerEngel (d)	YoUrMoMmA(d)	no WHY
1/24/2005 8:10:15 PM	DerEngel (d)	YoUrMoMmA(d)	just tell me
1/24/2005 8:10:20 PM (d)	YoUrMoMmA(d)	DerEngel	ok hold on let me find it
1/24/2005 8:10:42 PM (d)	YoUrMoMmA(d)	DerEngel	its rr's enterprise edition config
1/24/2005 8:10:48 PM	DerEngel (d)	YoUrMoMmA(d)	name?
1/24/2005 8:10:48 PM (d)	YoUrMoMmA(d)	DerEngel	\$4k a month
1/24/2005 8:10:54 PM (d)	YoUrMoMmA(d)	DerEngel	iam looking one second
1/24/2005 8:12:34 PM (d)	YoUrMoMmA(d)	DerEngel	isrrIP9BW9.bin
1/24/2005 8:12:47 PM	<b>DerEngel</b> (d)	YoUrMoMmA(d)	<b>whats its speeds?</b>

1/24/2005 8:12:47 PM (d) YoUrMoMmA(d) DerEngel thsi is a a very freaken ncie config

\* \* \*

1/24/2005 8:13:25 PM	DerEngel (d)	YoUrMoMmA(d)	so you dont actually have a copy of this
cfg then?			
1/24/2005 8:13:27 PM (d)	YoUrMoMmA(d)	DerEngel	4-5 mbit down
1/24/2005 8:13:47 PM (d)	YoUrMoMmA(d)	DerEngel	and 2.5mbit up
1/24/2005 8:14:00 PM (d)	YoUrMoMmA(d)	DerEngel	no ic an get thou
1/24/2005 8:14:08 PM (d)	YoUrMoMmA(d)	DerEngel	<b>i will dload it from tftp</b>
1/24/2005 8:14:13 PM (d)	YoUrMoMmA(d)	DerEngel	<b>if you want me to</b>
1/24/2005 8:14:18 PM	DerEngel (d)	YoUrMoMmA(d)	<b>please</b>

In the second part of the excerpt Phillips offers to download the configuration file if Harris would like. Harris responds, “please.” Phillips’s offer and Harris’s acceptance are not statements but rather admissible as verbal acts. See Diaz, 597 F.3d at 64.

#### E. Ex. 5, p. 7-8 [Purchase and sale price of TCNiSO modems]

In this excerpt, Harris tells Phillips how much they will charge for modems (after they have loaded the modems with TCNiSO software) and asks Phillips how much he paid for the modems originally. Phillips’s response is admissible as part of a discussion between co-conspirators about the profit margin of their enterprise.

1/25/2005 12:29:43 PM	DerEngel (d)	YoUrMoMmA(d)	<b>were gonna be selling</b>
1/25/2005 12:29:45 PM (d)	YoUrMoMmA(d)	DerEngel	my cell is fucked man
1/25/2005 12:29:46 PM	DerEngel (d)	YoUrMoMmA(d)	<b>SB5100 modems</b>
1/25/2005 12:29:49 PM (d)	YoUrMoMmA(d)	DerEngel	it wont call anymore
1/25/2005 12:29:50 PM	DerEngel (d)	YoUrMoMmA(d)	with Blackcat
1/25/2005 12:29:54 PM	DerEngel (d)	YoUrMoMmA(d)	<b>for 99.99</b>
1/25/2005 12:29:59 PM (d)	YoUrMoMmA(d)	DerEngel	nice
1/25/2005 12:30:06 PM (d)	YoUrMoMmA(d)	DerEngel	good profit
1/25/2005 12:30:14 PM	DerEngel (d)	YoUrMoMmA(d)	<b>you got them at what price?</b>
1/25/2005 12:31:38 PM (d)	YoUrMoMmA(d)	DerEngel	sb 3100 \$18
1/25/2005 12:31:42 PM (d)	YoUrMoMmA(d)	DerEngel	each
1/25/2005 12:31:46 PM (d)	YoUrMoMmA(d)	DerEngel	<b>sb5100 \$30.00 each</b>
1/25/2005 12:31:58 PM	DerEngel (d)	YoUrMoMmA(d)	tight!

#### F. Ex. 5, p. 13 [Selling bulk software to people who want to steal service]

In this excerpt, Phillips asks Harris how much he would like to charge someone who is looking to buy 10,000 licenses for TCNiSO’s sigma software and use them to steal service:

2/15/2005 10:33:25 PM (d)	YoUrMoMmA(d)	DerEngel	how much do you want to sell sigma
			liscense for
			in mass volum 10k of them

2/15/2005 10:33:39 PM (d)	YoUrMoMmA(d)	DerEngel	sb3100
2/15/2005 10:33:47 PM (d)	YoUrMoMmA(d)	DerEngel	they want to use these to steal service
2/15/2005 10:33:53 PM (d)	YoUrMoMmA(d)	DerEngel	we have to show them how to steal service too
2/15/2005 10:33:57 PM	DerEngel (d)	YoUrMoMmA(d)	2\$ a piece
2/15/2005 10:34:04 PM	DerEngel (d)	YoUrMoMmA(d)	20K USD
2/15/2005 10:34:07 PM	DerEngel (d)	YoUrMoMmA(d)	sounds good to me
2/15/2005 10:34:10 PM (d)	YoUrMoMmA(d)	DerEngel	ok
2/15/2005 10:34:16 PM	DerEngel (d)	YoUrMoMmA(d)	fuck
2/15/2005 10:34:22 PM	DerEngel (d)	YoUrMoMmA(d)	for 20K man, ill give them UNLIMITED
2/15/2005 10:34:24 PM	DerEngel (d)	YoUrMoMmA(d)	licenses

Phillips's initial question is not a statement and falls, therefore, outside of the hearsay rule. His subsequent assertion that "they want to use them to steal service -- we have to show them how to steal service too" is either (1) a co-conspirator statement because it is part of a discussion between two co-conspirators about the terms of a significant deal for the purchase of their products or (2) a description of an offer, which Harris subsequently accepts, and therefore falls outside the hearsay rule. Even if not admitted for their truth, these statements are necessary to give context to Harris's response, in which he indicates his enthusiasm for a sale to a customer who, he is being told, intends to use the product to steal service.

#### **G. Ex. 5, p.14-15 [TCNiSO's incorporation papers]**

In this excerpt, Phillips tells Harris that he has just received TCNiSO's incorporation papers:

2/25/2005 2:50:28 PM (d)	YoUrMoMmA(d)	DerEngel	Guess what came today
2/25/2005 2:50:37 PM (d)	YoUrMoMmA(d)	DerEngel	From Fedex
2/25/2005 2:51:04 PM (d)	YoUrMoMmA(d)	DerEngel	TCNISO'S OFFICIAL INORPORATION PAPERS TCNISO,INC,
2/25/2005 2:51:17 PM	DerEngel (d)	YoUrMoMmA(d)	ok?
2/25/2005 2:51:18 PM (d)	YoUrMoMmA(d)	DerEngel	TCNISO.INC is Now 100% a legal Corporation

\* \* \*

2/25/2005 2:55:14 PM (d)	YoUrMoMmA(d)	DerEngel	BUT liek i said we Are 100% legal company
2/25/2005 2:55:17 PM	DerEngel (d)	YoUrMoMmA(d)	and then we will start on our path to becoming Millionairs

Phillips's statement that he has received the incorporation papers is the reporting of a significant event as is therefore a co-conspirator statement. See Sepulveda, 15 F.3d at 1180. Furthermore, this statement is admissible to provide context for Harris's subsequent statement that they will now start on their path to becoming millionaires.

#### **H. Ex. 5, p.16 [Phillips cannot get on-line; Harris activates user on forums]**

In the first excerpt on this page, for which there appears to be no context, Phillips tells Harris that he has tried changing his MAC address five times but has not been able to get on line:

3/28/2005 8:43:04 PM (d)	YoUrMoMmA(d)	DerEngel	See i tried 5 Lagit mac addresses that i have NON of them get me online
3/28/2005 8:43:07 PM	DerEngel (d)	YoUrMoMmA(d)	IRC man

Harris's response, "IRC man," is a request that Phillips contact Harris via IRC, which is another internet-based chat program. In reporting the trouble he has encountered getting on line with a cloned MAC address, Phillips is alerting Harris to a possible problem with TCNiSO's products. This is therefore a co-conspirator statement. Furthermore, the statement is admissible as evidence that Harris knows that his partner is at least saying that he is attempting to use TCNiSO's software to change his MAC address and get internet service.

In the second excerpt, Phillips tells Harris that one of TCNiSO's users needs his account activated so that he can access the TCNiSO forums. Harris then does the activation.

3/29/2005 11:18:39 AM (d)	YoUrMoMmA(d)	DerEngel	<b>user bronx on forums needs to be activated on forums</b>
3/29/2005 11:19:04 AM (d)	YoUrMoMmA(d)	DerEngel	he cant login it says you need to be activated from administrator
3/29/2005 11:19:17 AM (d)	YoUrMoMmA(d)	DerEngel	no link in e-mail
3/29/2005 11:20:18 AM (d)	YoUrMoMmA(d)	DerEngel	hello
3/29/2005 11:24:27 AM	DerEngel (d)	YoUrMoMmA(d)	ok
3/29/2005 11:24:53 AM	DerEngel (d)	YoUrMoMmA(d)	okay
3/29/2005 11:24:54 AM	<b>DerEngel (d)</b>	YoUrMoMmA(d)	<b>activated</b>

3/29/2005 11:24:56 AM (d) YoUrMoMmA(d) DerEngel thanks

Phillips's report of a customer problem accessing the TCNiSO website is a co-conspirator statement in furtherance of the conspiracy, in that access to the website forums is one of the benefits that customers receive in return for buying TCNiSO's products. Furthermore, this statement is admissible to give context to DerEngel's response, which indicates that he has done the activation.

### **III. LINDQUIST'S STATEMENTS IN CHATS WITH HARRIS**

#### **A. Lindquist Was Harris's Co-Conspirator**

We will prove, by a preponderance of evidence extrinsic to Lindquist's own declarations in the chats, that Lindquist was a co-conspirator with Harris. Craig Phillips, who is expected to testify first, was a company insider and will testify that Lindquist was the primary software developer for TCNiSO. Lindquist herself will testify that she was the primary coder, a company insider, had been given stock in the company, and worked with Harris and Phillips to develop products designed to help other people steal free and faster internet service. Harris's own part of the chats set forth below establish that Lindquist was part of his inner circle and a co-conspirator in his cable modem hacking enterprise.

#### **B. Ex. 6, p.1 [Lindquist statement about getting banned]**

Lindquist's statement to Harris suggesting a method to increase publicity by getting banned more (by ISPs) was made "in furtherance of the conspiracy."

1/17/2005 4:20:51 PM Isabella(@) DerEngel	need kitty
1/17/2005 4:23:16 PM Isabella(@) DerEngel	we need to get banned more
1/17/2005 4:23:27 PM Isabella(@) DerEngel	thats good publicity

These statements are designed to advise Harris of techniques to increase sales of his cable modem hacking products. Like statements about "puffing" a product to increase its

sales, statements suggesting sales strategies and publicity techniques are in “furtherance of” the conspiracy. See Colon-Diaz, 521 F.3d at 37.

### C. Ex. 6, p.2 [Lindquist declarations about incorporation and money]

Lindquist’s declarations here are primarily questions about corporate status, her title, salary, and they are not hearsay. Rather, they are offered to give context to Harris’s responses.

2/7/2005 8:21:52 PM Isabella(@) DerEngel	what ever happened to the incorporation thing
2/7/2005 8:22:03 PM DerEngel Isabella(@)	400\$ a month?
2/7/2005 8:22:43 PM DerEngel Isabella(@)	paperwork is being filled, and we have a lawyer on staff and an accountant
2/7/2005 8:22:47 PM DerEngel Isabella(@)	TCNiSO Inc.
2/7/2005 8:34:28 PM Isabella(@) DerEngel	am i gonna be a principle?
2/7/2005 8:34:46 PM Isabella(@) DerEngel	?
2/7/2005 8:35:07 PM DerEngel Isabella(@)	principle partner
2/7/2005 8:35:21 PM Isabella(@) DerEngel	were going to issue stock
2/7/2005 8:35:41 PM DerEngel Isabella(@)	its all good so long as we dont make a little reported money, a little money is bad, lots of good
2/7/2005 8:35:44 PM Isabella(@) DerEngel	and when we are famous
2/7/2005 8:36:05 PM DerEngel Isabella(@)	were gonna have an IPO
2/7/2005 8:36:09 PM DerEngel Isabella(@)	oh
2/7/2005 8:36:15 PM DerEngel Isabella(@)	and check this out
2/7/2005 8:36:17 PM DerEngel Isabella(@)	once we get the inc.
2/7/2005 8:36:20 PM DerEngel Isabella(@)	lots is good, because if its a little bit of \$\$\$ most of that will go to pay off my debts forcibly, but alot of money, it wont matter as much
2/7/2005 8:36:21 PM Isabella(@) DerEngel	an inc, you cant IPO an LLC
2/7/2005 8:36:35 PM Isabella(@) DerEngel	we can get a merchant very easy
2/7/2005 8:36:52 PM DerEngel Isabella(@)	with inc.
2/7/2005 8:36:55 PM DerEngel Isabella(@)	isa?
2/7/2005 9:10:27 PM DerEngel Isabella(@)	blah ok
2/7/2005 11:07:53 PM Isabella(@) DerEngel	sup isa?
2/7/2005 11:08:24 PM DerEngel Isabella(@)	nothing
2/7/2005 11:08:30 PM Isabella(@) DerEngel	so you want 400\$ usd /
2/7/2005 11:49:13 PM DerEngel Isabella(@)	yes, it would be nice
2/8/2005 12:27:08 AM Isabella(@) DerEngel	

These declarations essentially amount to Lindquist’s “term sheet” about what she would like in terms of stock, salary, and title, in order to stay involved in the operation. Many of these are questions and do not constitute statements at all. They also amount to contractual negotiations and are therefore “verbal acts,” not hearsay. Insofar as they are statements, they are made “in furtherance of” the conspiracy because she is requesting certain terms to be met in order to continue her involvement in cable modem hacking.

**D. Ex. 6, p.3 [Lindquist declarations about investigations]**

Lindquist's statement to Harris speculating that a shipping address might belong to a law enforcement entity is made "in furtherance of" the conspiracy and in any case is not offered for its truth.

2/13/2005 5:21:23 PM DerEngel	Isabella(@)	Shipping Address: george roberts 758 South First Street Louisville, Kentucky 40202 United States
2/13/2005 5:21:49 PM Isabella(@)	DerEngel	i wonder whats at that address
2/13/2005 5:21:56 PM Isabella(@)	DerEngel	probably is police precient
2/13/2005 5:22:04 PM Isabella(@)	DerEngel	cable invesitgative board

Here, Lindquist's statement amounts to a warning of possible criminal or civil investigations into their cable modem hacking activities. Warnings to a co-conspirator about possible risks they face clearly "further" the conspiracy. In any case, her statement is not offered for the truth of the matter. Whether the address was in fact a police precinct or a cable investigative board is of no moment. The statement is offered for its effect on the listener. They bear on Harris's knowledge of the risk of being investigated.

**E. Ex.6, p.5 [Lindquist declarations about website blocking]**

Lindquist's declarations to Harris discussing the shutdown of TCNiSO website and discussing a possible court order are questions that give context to Harris's responses. They are not statements. Nor are they offered for their truth. Rather they are offered to show the effect on the listener. The statements bear on Harris's knowledge that the risk of a court order exists.

2/25/2005 5:15:09 AM DerEngel	Isabella(@)	bella?
2/25/2005 5:17:01 AM Isabella(@)	DerEngel	blah
2/25/2005 5:20:54 AM DerEngel	Isabella(@)	tcniso.net is being blocked
2/25/2005 5:21:46 AM Isabella(@)	DerEngel	tell me more
2/25/2005 5:23:57 AM Isabella(@)	DerEngel	agava moved it?
2/25/2005 5:32:50 AM DerEngel	Isabella(@)	they blocked it
2/25/2005 5:32:54 AM DerEngel	Isabella(@)	and deleted my ftp access
2/25/2005 5:33:12 AM DerEngel	Isabella(@)	something has to be fucked up
2/25/2005 5:33:22 AM DerEngel	Isabella(@)	its no where near the end of the month for payment
2/25/2005 5:33:33 AM DerEngel	Isabella(@)	and we didnt recieve a single fucking email regadling it
2/25/2005 5:34:30 AM Isabella(@)	DerEngel	court order?

\* \* \*

2/25/2005 5:40:03 AM DerEngel Isabella(@) agava is in russia  
2/25/2005 5:40:09 AM DerEngel Isabella(@) a court order wont do shit

In any case, even if deemed statements, they are made “in furtherance of the conspiracy.” Here, Lindquist is asking questions in order to help Harris unblock the tcniso.net website. Doing so would further the conspiracy, because it is the primary vehicle for running their cable modem hacking business.

#### **F. Ex. 6, p.6 [Lindquist statements about “cover story”]**

Lindquist’s statements to Harris discussing their protection from lawsuits, and what she will say as “cover” if she is sued, are made “in furtherance of” the conspiracy.

2/26/2005 3:49:26 PM DerEngel Isabella(@) we are incorporated now  
2/26/2005 3:49:36 PM DerEngel Isabella(@) so you are immune to lawsuits  
2/26/2005 3:49:48 PM DerEngel Isabella(@) that deal with cablemodem and cable modem  
hacking  
2/26/2005 3:49:58 PM Isabella(@) DerEngel personally there is some protection  
2/26/2005 3:50:06 PM DerEngel Isabella(@) some?  
2/26/2005 3:50:06 PM Isabella(@) DerEngel and i can just say i was doing what i was told  
2/26/2005 3:50:12 PM DerEngel Isabella(@) exactly  
2/26/2005 3:50:19 PM DerEngel Isabella(@) anything related to "cablemodems"  
2/26/2005 3:50:23 PM DerEngel Isabella(@) your protected

These statements amount to her planning their joint defense if they get caught, which is in turn “furthering” their conspiracy. She is also assuring Harris that she is going to protect him (and herself) and stay involved in the conspiracy.

#### **G. Ex.6, p.8 [Lindquist statement about laughable disclaimer]**

4/14/2005 3:15:37 PM Isabella(@) DerEngel i added disclaimer, saying essentially the device  
should not be used for malicious purposes  
hehehehehe

Harris does not respond to this statement, and there are no more chats between them that day. Lindquist’s statement to Harris about adding a “disclaimer” (and adding a “hehehehehe” at the end, presumably to signify that she viewed it as a joke) is an adoptive admission, as Harris remains silent in the face of Lindquist’s mocking their

disclaimer. They amount to an admission that Harris also viewed the disclaimers as laughable. Furthermore, the statement is made “in furtherance of” the conspiracy. Lindquist is essentially strategizing about ways to protect Harris and her from liability, so that they can continue with their cable modem hacking conspiracy. She is also reporting updates (namely, adding the disclaimer) to her co-conspirator. See Aviles-Colon, 536 F.3d at 7. Further, her statement is not offered for its truth. Whether she in fact added the disclaimer is irrelevant. The relevance of the statement is in her “he he he he he”--- wherein she communicates to Harris that she viewed the disclaimers as laughable. So it is being offered not for its truth but for its effect on the listener---that Harris knew that Lindquist viewed the disclaimers as a joke.

#### **IV. “MR. T’s” DECLARATIONS IN CHATS WITH HARRIS**

##### **A. “Mr.T” Was Harris’s Co-Conspirator**

The government will prove, by a preponderance of evidence extrinsic to Mr.T’s own chat declarations, that Mr.T was a co-conspirator with Harris. We will rely principally on Harris’s party admissions, set forth in the *Harris* portions of the chat excerpts below, to establish that (1) Harris personally gave Mr.T access to the member forum, (2) Harris agreed to have Mr.T act as a broker for him, where Harris would pay Mr. T a commission to sell TCNiSO’s products, and (3) Harris at one point paid him \$50.

3/31/2005 12:27:34 PM Mr T	DerEngel	can you add me to the website member section? I think my old l/p dont work anymore or i forgot the real l/p hehehe
3/31/2005 12:28:30 PM DerEngel	Mr T	yea
3/31/2005 12:28:37 PM DerEngel	Mr T	whats your pass?
3/31/2005 12:29:03 PM Mr T	DerEngel	342634
3/31/2005 12:29:35 PM Mr T	DerEngel	thanks
3/31/2005 12:29:59 PM DerEngel	Mr T	done
3/31/2005 12:30:01 PM DerEngel	Mr T	login: butcher
3/31/2005 12:30:10 PM Mr T	DerEngel	thanks

//

//

//		
4/6/2005 4:15:19 PM Mr T	DerEngel	yeah well i was wondering if you could give me a comission or something like that if i get some ppl to uncap using tcniso software/hardware
4/6/2005 4:15:30 PM Mr T	DerEngel	but if you cant i totally understand
4/6/2005 4:16:03 PM DerEngel	Mr T	lol
4/6/2005 4:16:14 PM DerEngel	Mr T	im sure we can work something out
//		
//		
//		
4/20/2005 5:41:05 PM Mr T	DerEngel	do you think we could arrenge something so i could try and refer a bunch of ppl to you?
4/20/2005 5:42:03 PM DerEngel	Mr T	how so?
4/20/2005 5:43:24 PM Mr T	DerEngel	well like i get a bunch of ppl into buying modem and sigma license on tcniso.net and you give me some kind of comission
4/20/2005 5:43:43 PM Mr T	DerEngel	i could also find ppl interested to pay even more then what your already asking lol
4/20/2005 5:43:51 PM Mr T	DerEngel	something like that
4/20/2005 5:44:18 PM DerEngel	Mr T	yea
4/20/2005 5:44:21 PM DerEngel	Mr T	just refer them
4/20/2005 5:44:23 PM DerEngel	Mr T	and let me know
4/20/2005 5:44:37 PM Mr T	DerEngel	okay cool
4/20/2005 5:45:19 PM Mr T	DerEngel	should i use a special url so we know they came from me or?
4/20/2005 5:45:29 PM DerEngel	Mr T	there is no system setup like
4/20/2005 5:45:36 PM DerEngel	Mr T	that, youll need to give me the order numbers
4/20/2005 5:45:43 PM DerEngel	Mr T	and email of the user
//		
//		
//		
4/20/2005 6:03:24 PM Mr T	DerEngel	and do you have an idea about how much i could make for each person or bunch of person i get to buy?
4/20/2005 6:09:33 PM DerEngel	Mr T	enough to make it worth your while
4/20/2005 6:09:41 PM DerEngel	Mr T	because you are a friend to me and shagy
4/20/2005 6:09:47 PM DerEngel	Mr T	and you know, we both have your back
4/20/2005 6:10:05 PM Mr T	DerEngel	excellent
4/20/2005 6:10:11 PM Mr T	DerEngel	thanks a lot!
//		
//		
//		
7/10/2005 12:47:30 AM DerEngel	Mr T	you there?
7/10/2005 12:47:38 AM Mr T	DerEngel	i am!
7/10/2005 12:47:48 AM DerEngel	Mr T	i got 50\$ for you
7/10/2005 12:47:52 AM DerEngel	Mr T	whats your paypal?
7/10/2005 12:48:01 AM Mr T	DerEngel	im almost done setting up everything
7/10/2005 12:48:05 AM Mr T	DerEngel	cool

(Ex. 17, pp.1-5).

#### **B. Ex.17, pp.1,5 [Mr.T statements about his criminal prosecution]**

Mr.T's statements that he has been charged criminally for committing theft of service, as well as his later statements about the proof the government has against him, are "in furtherance of" the conspiracy, and in any event are not offered for their truth.

3/31/2005 11:21:28 AM Mr T	DerEngel	i got some new from my lawyer secretary
3/31/2005 11:21:52 AM Mr T	DerEngel	they received the rest of the proof communication
3/31/2005 11:22:07 AM Mr T	DerEngel	from the police or whoever
3/31/2005 11:22:18 AM Mr T	DerEngel	she cant mail the document to me since there is
3/31/2005 11:22:29 AM Mr T	DerEngel	too many
3/31/2005 11:22:36 AM DerEngel	Mr T	ill have to go there and go trough all the paper
3/31/2005 11:23:25 AM Mr T	DerEngel	must be full of irc log and things like that :
3/31/2005 11:23:46 AM Mr T	DerEngel	:/
3/31/2005 11:24:17 AM Mr T	DerEngel	i hope it will be settled off court
3/31/2005 11:24:21 AM Mr T	DerEngel	cause if i have to go to court ill just plead guilty
3/31/2005 11:25:20 AM DerEngel	Mr T site	oh and btw
		whats your adduser?
3/31/2005 11:25:35 AM Mr T	DerEngel	adduser DerEngel forgetme3
3/31/2005 11:25:43 AM Mr T	DerEngel	duron@66.220.110.*
3/31/2005 11:26:03 AM Mr T	DerEngel	excellent
		i cant wait for this shit to be over
3/31/2005 11:26:12 AM Mr T	DerEngel	i mean fuck its only 2month of theft of service im
3/31/2005 11:26:34 AM Mr T	DerEngel	being accused
3/31/2005 11:27:14 AM DerEngel	Mr T	while i was paying for unlimited package
//		i lost so much money and the best job ever
//		:/
4/18/2005 7:38:51 PM Mr T	DerEngel	i saw the proof they got against me
4/18/2005 7:38:55 PM Mr T	DerEngel	im so busted
4/18/2005 7:39:00 PM Mr T	DerEngel	its not even funny
4/18/2005 7:39:05 PM Mr T	DerEngel	they got all my irc log
4/18/2005 7:40:02 PM Mr T	DerEngel	plus they got all my sites.dat and they think i
4/18/2005 7:40:09 PM Mr T	DerEngel	hacked all of those ip
		it sucks

Mr.T's statements amount to reports of significant events to a co-conspirator and are therefore "in furtherance of" these conspiracy. See Sepulveda, 15 F.3d at 1180. He in essence is warning Harris about the dangers of their cable modem hacking activities and telling him what type of evidence the government has obtained against him. Further, the statements are offered to show the effect on the listener, not for their truth, because they show that Harris was told that a user was facing criminal exposure as a result of stealing service.

#### **C. Ex. 17, p.4 [Mr.T declarations about product efficacy]**

Mr. T's declarations asking Harris how effective Sigma is with various ISPs are not statements and therefore are not hearsay. Rather, they are questions and give context to Harris's responses. In any case, even if they were deemed statements, they are made

in furtherance of the conspiracy. This is because Mr. T is trying to learn about TCNiSO's various product features, presumably so that he can market them more effectively in his role as a broker. This is information that will help Mr. T play his role in the conspiracy.

4/20/2005 5:46:21 PM Mr T	DerEngel	did you got some good feedback from ppl using sigma on videotron cogeco or rogers in quebec?
4/20/2005 5:46:30 PM Mr T	DerEngel	so im sure it will work for them
4/20/2005 5:48:12 PM DerEngel	Mr T	i dunno?
4/20/2005 5:49:13 PM Mr T	DerEngel	well i mean is sigma working 100% with all isp?
4/20/2005 5:49:39 PM DerEngel	Mr T	everyone accept adelphia, yes
4/20/2005 5:49:49 PM DerEngel	Mr T	and maybe 1 in australia
4/20/2005 5:49:56 PM Mr T	DerEngel	okay cool
4/20/2005 5:50:15 PM Mr T	DerEngel	what are those isp doing?
4/20/2005 5:50:37 PM DerEngel	Mr T	something with the modems cert
4/20/2005 5:50:47 PM DerEngel	Mr T	we will have it cracked soon
4/20/2005 5:50:52 PM Mr T	DerEngel	great

#### **D. Ex.17, pp.4-5 [Mr.T declarations about theft of service]**

Mr. T's question to Harris, asking if users can engage in MAC cloning or configuration file cloning to steal service, if "they had a diabolic mind," followed by a "lol" ("laugh out loud") is a question, not a statement, and it gives context to Harris's responses. Further, to the extent that it is a statement, it constitutes an adoptive admission by Harris.

4/20/2005 6:14:48 PM Mr T	DerEngel	so ppl on sigma can get online with the mac cloning or with a legit mac and use the highest config file?
4/20/2005 6:15:01 PM Mr T	DerEngel	and cannot use self made config file?
4/20/2005 6:15:33 PM DerEngel	Mr T	we dont condone theft of service
4/20/2005 6:15:53 PM Mr T	DerEngel	okay good idea :P
4/20/2005 6:16:34 PM Mr T	DerEngel	but thats would be their option if they had a diabolic mind? lol
4/20/2005 6:16:44 PM DerEngel	Mr T	yep
4/20/2005 6:16:54 PM Mr T	DerEngel	excellent

Moreover, these declarations are in furtherance of the conspiracy, because Mr. T is trying to learn more about product features, presumably so that he can market them more effectively to others.

## V. MOORER DECLARATIONS IN CHATS WITH HARRIS

### A. MooreR Was Harris's Co-Conspirator

The government will prove, by a preponderance of evidence extrinsic to MooreR's own chat declarations, that MooreR was a co-conspirator with Harris. We will rely principally on Harris's party admissions, set forth in the *Harris* portion of the chat excerpts below, to establish that MooreR worked with Harris to help develop a sniffer program, "CoaxThief," and a MAC changing application to offer on Harris's website.

8/5/2005 3:34:23 PM DerEngel	MooreR	we have to pick on a name
8/5/2005 3:34:31 PM DerEngel	MooreR	that is not.. well, google friendly
8/5/2005 3:34:34 PM DerEngel	MooreR	example
8/5/2005 3:34:38 PM DerEngel	MooreR	"Cable Modem Sniffer"
8/5/2005 3:34:50 PM DerEngel	MooreR	is a bad search result
8/5/2005 3:34:54 PM DerEngel	MooreR	make sense?
8/5/2005 3:34:55 PM MooreR	DerEngel	yeah
8/5/2005 3:35:05 PM DerEngel	MooreR	so play around with some names
8/5/2005 3:35:07 PM DerEngel	MooreR	such as
8/5/2005 3:35:14 PM DerEngel	MooreR	LanThief
8/5/2005 3:35:17 PM DerEngel	MooreR	CoaxThief
8/5/2005 3:35:20 PM DerEngel	MooreR	ModemTheif
8/5/2005 3:35:25 PM DerEngel	MooreR	LanSniff

(Ex.21, p.1).

### B. Ex.21, p.1 [MooreR declarations about sniffer and MAC changer]

MooreR's declarations are largely questions seeking feedback from Harris about the software programs (specifically the sniffer and MAC changer) that he is providing to Harris. They are not statements. They give context to Harris's responses. To the extent that they are hearsay statements, they are made "in furtherance" of the conspiracy. They provide information about salient features of the software (for example the name and functionality).

8/5/2005 5:43:08 PM MooreR	DerEngel	so you liked the sniffer
8/5/2005 5:44:22 PM DerEngel	MooreR	its very well designed
8/5/2005 5:44:25 PM DerEngel	MooreR	love the gui
8/5/2005 5:44:30 PM DerEngel	MooreR	did you decide on a name yet?
8/5/2005 5:44:49 PM MooreR	DerEngel	no i have been away, but CoaxSniffer or Theif is pretty promising
8/5/2005 5:46:20 PM MooreR	DerEngel	<a href="http://moorer-software.com/screenshots/">http://moorer-software.com/screenshots/</a> you can check out some other GUIs

for things ive designed in the past 8/5/2005 5:46:26 PM MooreR 8/5/2005 5:51:10 PM MooreR	DerEngel DerEngel	maybe you see something that catches your eye maybe I should include my software mac changer?
8/5/2005 5:51:16 PM MooreR 8/5/2005 5:51:22 PM DerEngel 8/5/2005 5:51:45 PM MooreR	DerEngel MooreR DerEngel	might be of use to some people how does it work? it uses the registry to change the software based MAC, it will use WMI to detect all network adapters and you can choose it, it reads your current and then u can change it
8/5/2005 5:51:54 PM MooreR	DerEngel	<a href="http://www.moorer-software.com/screenshots/bmacc.jpg">www.moorer-software.com/screenshots/bmacc.jpg</a>
8/5/2005 5:52:13 PM MooreR	DerEngel	i saw a couple and i was dissapointed they wanted money for such an easy app
8/5/2005 5:52:24 PM MooreR 8/5/2005 5:52:26 PM DerEngel	DerEngel MooreR	so i whipped this up that would be a cool app to put on the website

### C. Ex.21, p.3 [MooreR declarations about Harris's hidden identity]

MooreR's declarations are essentially questions, where he is asking Harris who he is, and when Harris refuses to answer, he questions Harris's refusal. His comments give context to Harris's response.

9/2/2005 5:29:18 PM DerEngel 9/2/2005 5:29:25 PM DerEngel 9/2/2005 5:29:29 PM MooreR 9/2/2005 5:29:30 PM DerEngel 9/2/2005 5:29:42 PM DerEngel 9/2/2005 5:29:49 PM DerEngel 9/2/2005 5:30:54 PM MooreR	MooreR MooreR DerEngel MooreR MooreR MooreR DerEngel	you should know by now that i never answer personal questions ok to me, everything is about hacking to succeed you must focus or you will never overcome the impossible well, there is no reason to live like the world is after you, that's no way to live.. dude
9/2/2005 5:31:46 PM DerEngel 9/2/2005 5:31:51 PM DerEngel 9/2/2005 5:32:00 PM DerEngel 9/2/2005 5:32:08 PM DerEngel 9/2/2005 5:32:11 PM DerEngel 9/2/2005 5:32:28 PM DerEngel 9/2/2005 5:32:43 PM MooreR	MooreR MooreR MooreR MooreR MooreR MooreR DerEngel	i think you forget im a professional hacker as in, its what i do for a living its what pays my bills i get paranoid just to check whos at my front door so? if you do it professionaly you dont have to hide your identity.. if it's professional you have permission to check things
9/2/2005 5:33:00 PM DerEngel	MooreR	because i know things that would scare the shit out of you
9/2/2005 5:33:22 PM MooreR 9/2/2005 5:34:52 PM DerEngel 9/2/2005 5:45:18 PM MooreR	DerEngel MooreR DerEngel	ok.. but it's not like i want to come after you ah yes, reassurance i see the whole fibercoax group hates you for one reason or another, i hope I dont encounter that side of you
9/2/2005 5:45:37 PM DerEngel 9/2/2005 5:45:42 PM DerEngel	MooreR MooreR	well I am the creator

## VI. X-FACTOR STATEMENTS IN CHATS WITH HARRIS

### A. Ex. 19, pp.2-3 [X-Factor description of Harris's hacking business]

The government does not seek to introduce this excerpt from a chat between “X-factor” and Harris as a co-conspirator statement but rather as an adoptive admission by Harris, under Fed. R. Evid. 801(d)(2)(B). In this chat, “X-Factor” and Harris are negotiating compensation for X-Factor, in the form of money or stock. During the course of this discussion, X-Factor describes TCNiSO as “a business based on hacking other businesses.” Harris does not deny this characterization, thereby adopting it as his own admission.

8/22/2005 7:13:20 AM	DerEngel	X-Factor	there is, because before i will legally give you your shares, your going to sign the contract maybe your not understanding what I am saying. i don't care about shares what I care about is how much your going to buy me out for me in this fantasy stock and I don't care if me calling it that pisses you off, because to me it is cause I don't got it.
8/22/2005 7:14:17 AM	X-Factor	DerEngel	then that just goes to show me how much you think tcniso is real
8/22/2005 7:14:41 AM	DerEngel	X-Factor	and makes me wonder why i would even promise you 5%
8/22/2005 7:14:59 AM	DerEngel	X-Factor	because between you and me
8/22/2005 7:15:13 AM	DerEngel	X-Factor	well man its a business based on hacking other businesses
8/22/2005 7:15:15 AM	X-Factor	DerEngel	the only reason im going to give you shares
8/22/2005 7:15:19 AM	DerEngel	X-Factor	is out of respect
8/22/2005 7:15:21 AM	DerEngel	X-Factor	

## VII. PRIVATE MESSAGES FROM CUSTOMERS TO HARRIS

The government will seek to introduce two private messages (“PMs”) sent to Harris from product customers.

### A. Ex. 28, p.1 [PM about dangers from uncapping]

In one PM, (sent from User ID 2,854), the user tells Harris that “things are getting dangerous down here in Colombia for uncappers” and asks to be removed from any of records and have his membership revoked.

AUTHOR User ID: 2, 854

Hello there. The thing is, i don't want to be a member anymore. Things are getting dangerous down here in Colombia for uncappers and i haven't done it for a long time now, and i will not do it again. ¿Is there anyway you can erase me from your database and unregister me as a member? Also, ¿could you erase all my posts? I would really apreciate it. Hope you understand. Thanks in advance.

Best regards.

This statement is not hearsay, because it is not offered for its truth. Rather, it is offered for its effect on Harris. The user is not being charged in this matter with wire fraud, so whether he was in fact uncapping is not an issue. It is being introduced to show that Harris was told that his users were uncapping and that at least this user was concerned that he could get in trouble for uncapping.

#### **B. Ex. 28, p.4 [PM about stealth mode]**

In this PM, (sent from User ID 24,433), the user asks Harris how to put Sigma into "stealth mode so my ISP wont drop me."

AUTHOR User ID: 24, 433

##### **Sigma X2 142 Telnet command for stealth**

Sigma X2 142 Telnet command foHr is Ite waoltuhld like to know when I install the Sigma X2 142 I actually would like to know how to put this firmware stealth so my ISP wont drop me down what is the command to enter to make it stealth please let me know thank you.

This is not hearsay because it is a question, not a statement. Furthermore, it is not being offered for the truth of the matter – that the user's ISP would drop him or her. Rather, it is being offered to establish that TCNiSO users told Harris that they were concerned about being dropped and wanted to be in "stealth mode."

### **VIII. FORUM POSTS BY PRODUCT PURCHASERS/MEMBERS**

The government will seek to introduce several posts on the [tcniso.net](http://tcniso.net) forums made by TCNiSO product purchasers and website members. These posts are generally part of longer threads in which different users discuss a particular topic. We have organized the

posts that we intend to offer at trial into three exhibits, grouping them by the subject matter of the posts. We have included in the exhibits the entire thread surrounding the posts that we intend to highlight for the jury, to provide context. But if the Court would like, we can revise the exhibits to include only the posts we intend to highlight.

#### A. Ex. 22, pp.7-12 [Posts about MAC/Config Trading]

The government intends to offer two threads made up of posts by users who stated that they were seeking or offering MAC addresses and configuration files. Representative posts are:

I have Macs alot of macs willing to trade  
by sean19661 on Sun Dec 09, 2007 2:56 pm  
I have some macs to trade what area are you in.

insightbb macs  
by aspeer on Mon Dec 24, 2007 4:42 am  
insight macs from springfield, il need some from elsewhere pm me

These posts are verbal acts rather than statements; as such, they are not hearsay. Statements that are not assertions or that have independent legal significance, such as words by contracting parties, statements giving consent, or offers, are not hearsay. See Diaz, at 64; Faulkner, 439 F.3d at 1225-27; Bellomo, 176 F.3d at 586-87.

Even if the Court were to conclude that these are statements rather than verbal acts, these posts are not being offered for the truth of the matters asserted and are therefore not hearsay. Courts have held that out-of-court statements are admissible when offered to show their effect on the listener and not offered for the truth of the matter asserted. See, e.g., Bellomo, 176 F.3d at 586-87 (holding that declarant's statement that victim was killed because he was dealing drugs was not hearsay because it was offered for listener's state of mind, not reason for murder); United States v. Darby, 744 F.2d 1508, 1524 (11th Cir. 1984) (holding that statement that declarant knew of

witness' brother's location was offered for effect on listener); United States v. Nieto, 60 F.3d 1464, 1468 (10th Cir. 1995) (holding that declarant's instructions to defendant to take car and make drugs into squares were not hearsay because introduced for effect on listener).

Here, the government will offer the posts to help show that Harris *knew* that his users were posting on his forums that they were trading MAC addresses and configuration files. Through testimony by Lindquist, Phillips, and Hanshaw, the government will show that Harris read and was a moderator of the forums. Furthermore, the government will offer exhibits corroborating the testimony that Harris was a forum moderator and showing that he was the account-holder for the website. The government intends to rely on ample other evidence to show the underlying truth that users were bartering MAC addresses and configuration files on TCNiSO's website, including testimony of Phillips, Lindquist, Hanshaw and the other Massachusetts users.

#### **B. Ex. 23, p.4 [Post about Blocking and Detection]**

The government intends to introduce a user post about how to avoid detection and blocking by cable companies.

hey  
by dj212 on Wed Nov 16, 2005 3:20 am  
read other post regarding to rr<sup>1</sup> and you will see that rr is logging mac...so if you have a mac  
and you are trying to get a higher spped they blacklist your macs...you will have to change  
your modem's mac and your Nic card mac...i know from experience  
they used you PC NIC mac and CM MAc and serial # for there dhcp servers and access

As with the MAC swapping posts, this post is not offered for its truth; rather it is being offered to show that Harris's customers were posting, on his website, that they were concerned about being detected and "blacklisted" by their ISPs. Furthermore, in the event that the Court determines that this post is being offered for the truth of the matters

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<sup>1</sup> "RR" is RoadRunner, which is an ISP.

asserted, it is still admissible as a co-conspirator statement. The person using the name "DJ212" is listed in TCNiSO's records as a customer, and this post is an effort to further the conspiracy by warning other customers as well as the TCNiSO insiders about the risk of being banned by the ISP RoadRunner.

### C. Ex. 24, p.6, 11, 15, 19, 23 [Posts about Theft of Service and Uncapping]

The government intends to introduce posts from users who state that they are planning to steal internet access or uncap or that they have, in fact, successfully done so.

by **LVNeptune** on Tue Jun 28, 2005 2:59 pm

Seems RR is starting to ban NIC mac's who have been stealing service and/or uncapping (in the Tampa area anyway) had to change my NIC MAC about 4 times to get a DHCP IP from the service...guess they are finally starting to catch on

by **Joe-Techno** on Thu Aug 25, 2005 1:17 pm

hi first time posting so just wondering i have a surbroad forgot which number but i know i can uncap it. however what i'm wondering whats the chances of me getting caught in Ny for RR. also is there any advice you guys could give me not to get caught. thanks for reading!

by **liveitup278** on Fri Nov 16, 2007 6:14 am

Hey man,

I am pretty new to this even though I have diligently been working on this for the last two months. I live in Chicago and am really interested in effin over the Cable companys and getting free fast internet.

So I got the SB5100 and installed everything I needed to do (Sigma-X2, blackcat, whatever) and now im just figuring out what SNMP has to do with anything. Maybe u can tell me, quickly, what to change in my settings so I can get on the internet with my SB5100 thats not even registered? And I got the Mibrowser, but it wont let me get the Mac addys of anybody in the RCN network. Even if I had the Mac addy, serial number, whatever.. the config file and all.. can u quickly tell me what I would do? Ill make sure to repay u somehow BTW I live in Lincoln Park and go to Depaul so if ur around and could talk bout it that would be awesome too

whatever u can do will be greatly appreciated

by **pmeigrath** on Sat Jun 17, 2006 11:52 pm

I really dont understand why such reaction.

Lets be realistic, this is a business, the only one in his kind, as other sites have died and theres only one hacked firmware for 5100, there is only one place where u can go, HERE! How much money has DerEngel saved u?? A lot ,i think since most of u have a free and Fast internet thx to him.

Tho i did read somewhere in tcniso, sometime ago, that by buying blackcat u would have all future sigma releases for free, now he changed his mind, but Hey, the guy deserves the money. None of u work for free, do u?

Now one question to DerEngel, ive read a time ago that sigma x2 would have the feature of FileSystem like sigma 1.7 has, Will this be a feature on the next release of X2?

Other question, Have u sent the X2 firmware to preselected member for beta testing as u say in the mainpage? (Just to know if ur plan releases are going like u said, so sigma wil be released as predicted)

free internet?

by **bored7one4** on Sun Mar 22, 2009 5:39 pm

ok so i've been doing some reading in this forum but still really new at this. From what i understand when you mod these modem you can uncap the speed but what i want to know is how can i get service when i dont have an account with my cable ISP? My brother was sole a modem that he just plug into his new house and he has free internet. How can i get my modem i order to work the same as my brother? I was given access to my neighbor modem and i have his mac address info will that be useful ? Is there a way i can clone the box my brother got?

sorry for the newbie question but i was told if i order one of these pre-mod modem with a valid mac(my neighbor) I would be able to get free service.

Any input would help.

Thanks

As with the MAC swapping posts, these posts are not offered for their truth; rather they are offered to show that Harris was told that users were using his products and services to steal internet access and uncap. To the extent that they are primarily questions rather than statements, they fall outside the hearsay rule. Furthermore, in the event that the Court determines that portions of these posts are being offered for the truth of the matters asserted, they are still admissible because they are not hearsay but are instead co-conspirator statements. The people who made these posts are all customers, according to TCNiSO's records, and these statements are all aimed at furthering the conspiracy by sharing information about how to use TCNiSO's products.

## **IX. TESTIMONY BY TCNiSO INSIDERS**

Two of the government's witnesses were TCNiSO insiders (Phillips and Lindquist), and one was a quasi-insider (Nathan Hanshaw). Phillips and Lindquist will each describe topics that they discussed regularly with Ryan Harris, including: (1) that TCNiSO's customers were using its products to steal service and uncap their modems; (2) that they needed continually to modify TCNiSO's products to circumvent the cable companies' blocking efforts; and (3) that they were afraid of getting caught and took steps to hide. Because of the amount of time that has passed since these conversations, and because they both spoke to Harris on a daily basis during their multi-year involvement with TCNiSO, neither Phillips nor Lindquist will be able to recount these

conversations with any specificity (other than to the extent that they are captured in the chat logs).

To the extent that this testimony about frequent topics of conversation with Harris implicates the hearsay rule, it is admissible as co-conspirator statements. As is discussed above, both Phillips and Lindquist were co-conspirators, and their discussions with Harris about TCNiSO's product uses, product development, and the effort to avoid detection were all in furtherance of the conspiracy.

Hanshaw was a quasi-insider, who chatted regularly with Lindquist and Phillips, obtained TCNiSO's products from them, and was a regular presence on TCNiSO's forums and community chat room (this room allowed insiders and customers to chat online as a group). Hanshaw will testify that he was frequently in the community chat room at the same time as Harris and that, during those occasions, Hanshaw discussed trading MAC addresses and stealing internet service. He will also testify that, on at least one occasion, he discussed cable modem hacking with Harris. The government will offer this testimony not for the truth of Hanshaw's prior statements but rather to show that Harris was aware of Hanshaw and of his claims to be using TCNiSO's products to obtain free internet access. This testimony would also, however, be admissible as co-conspirator statements, because Hanshaw was a co-conspirator and because his statements were in furtherance of the conspiracy's goal of helping users steal internet access.

**X. CONCLUSION**

For the above reasons, the Court should allow the government's motions in limine.

Respectfully submitted,

CARMEN M. ORTIZ  
United States Attorney

By: /s/ Adam Bookbinder  
Adam J. Bookbinder  
Assistant U.S. Attorney  
Mona Sedky  
DOJ Trial Attorney

**CERTIFICATE OF SERVICE**

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Adam J. Bookbinder

Dated: February 3, 2012